In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 159

J. R. MASON,
Petitioner,

vs.

MERCED IRRIGATION DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner J. R. Mason prays that a writ of certiorari issue to review the decision (R. 51) of the Circuit Court of Appeals for the Ninth Circuit made in the above entitled cause on March 21, 1942, which affirmed the final decree of the District Court for the

Southern District of California, Northern Division, rendered against petitioner and others on July 15, 1941 (R. 51, 54).

OPINION BELOW.

Opinion of the Circuit Court of Appeals, 126 Fed. (2d) 920.

JURISDICTION.

A decision of the Circuit Court of Appeals was rendered March 21, 1942 (R. 78). The mandate was stayed until disposition of the case by this court (R. 82). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code. (28 U.S.C. Sec. 347 (a)).

STATUTES INVOLVED.

Municipality Bankruptcy Act of May 24, 1934, c. 345 (48 Stat. 798), 11 U.S.C. 301-303, adding Sections 78-80 to the Bankruptcy Act of 1898; Act of August 16, 1937, c. 657 (50 Stat. 654), 11 U.S.C. 401-404, adding Sections 81-84; and Act of June 22, 1938, c. 575, Sec. 3 (b) (52 Stat. 940). Principal California statutes involved are "the California Irrigation District Act", Cal. Stat. 1897, p. 254, as amended; the "California Districts Securities Commission Act", Cal. Stat. 1931, p. 2263, as amended.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a proceeding brought by the respondent, Merced Irrigation District, a California Irrigation District, for composition of debts under Chapter IX of the Bankruptcy Act of 1898 as amended (11 U.S.C. Secs. 401-404).

The Merced Irrigation District, herein referred to as "the district", is an instrumentality and arm of the State of California, exercising exclusively governmental functions. *Anderson-Cottonwood I. D. v. Klukkert,* 13 Cal. (2d) 191, 88 Pac. (2d) 685. The district was formed under the provisions of Cal. Stats. 1897, p. 254, as amended, and is situated in the County of Merced, State of California.

Theretofore, to-wit, on June 17, 1938, a petition of the district for interlocutory decree approving its plan of composition under the terms of the Bankruptcy Act relating to the composition of indebtedness of local taxing agencies was filed, and on February 21, 1939, an interlocutory decree confirming the plan of composition was entered (R. 25). Thereafter an appeal was taken to the United States Circuit Court of Appeals, which was thereafter affirmed by the Circuit Court of Appeals on September 5, 1940 (R. 24, 25, 1, 3) (114 F.(2d) 654). Thereafter the appellants therein petitioned the United States Supreme Court for a writ of certiorari, which was denied by the U. S. Supreme Court on January 6, 1941 (312 U. S. 714). By said interlocutory decree it was provided that the petitioner should make available 51.501 cents on each dollar of unpaid principal of its bonded in-

debtedness, which amount is $16,190,000 (R. 26). The district subsequently made funds available therefor and applied to the District Court for a final decree (R. 32). There is no question about the district having deposited the funds as provided by the interlocutory decree. Petitioner objected to the entry of the final decree. The District Court none the less entered its final decree (R. 51, 54) providing amongst other things that petitioner, Merced Irrigation District, respondent herein, is discharged from all debts and liabilities dealt with in the plan of composition (R. 54) and restraining petitioner herein from asserting any claim or demands against petitioner district or its officers or against the property situated therein or the owners thereof (R. 53). The appeal was taken from the final decree.

By proper specification of error and statement of points, the petitioner J. R. Mason sought a reversal of the decree (R. 58, 72); thereby amongst other things respondent charged that the decree interferes with the governmental and political powers and duties of the respondent and violates the Constitution of the United States and of the State of California, in that respect (R. 59, 72).

QUESTIONS PRESENTED.

1. Where bonds issued by a political entity are not based on a trust deed which provides for modification of the terms of the bonds by the vote of a majority of bondholders, and where the rights of one bondholder

cannot be changed, even by the consent of all bondholders save that one, as the State Court has squarely held (*Selby v. Oakdale I. D.,* 140 Cal. App. 171, 35 P. (2d) 125) can his property be taken because other bondholders voluntarily elected seven years ago to accept a compromise cash offer rather than await the ultimate full payment of their claims?

2. Since this Court decree *discharges* respondent from its lawful duty to levy taxes adequate to meet its contractual obligations, must it not also be that the Court can now exercise its equitable powers to compel this or some other governmental agency of a State, or the State itself to levy an *ad valorem tax* on land in excess of the rate provided by law, although this is in direct conflict with the rule established in *Thompson v. Allen County,* 155 U.S. 550, and *Ohio Life Ins. Co. v. Debolt,* 16 How. 415?

3. Since it has been steadfastly adhered to by this Court that a federal tax on the interest received from bonds similar to those in the case at bar, is prohibited as a burden upon or interference with the State's borrowing power, must it not be held that a decree by any Federal Court discharging respondent from its continuing and irrevocable contract to levy annually taxes on the value of land until all contracts are fulfilled equally constitutes an "interference" with the State's borrowing power, which "interference" is we submit, explicitly prohibited in the Act itself?

4. In view of the *International Shoe Co. v. Pinkus,* 287 U. S. 261, 265, case, holding that the bankruptcy

power is "unrestricted and paramount" and that the States "may not pass or enforce laws to interfere with or complement the bankruptcy act or to provide additional or auxiliary regulations", if the decree here questioned stands, will any State be able to borrow money upon the pledge of the exercise of its taxing power, confided to one of its agencies, free from the power of a bankruptcy Court to interfere with the contract and even to declare it fully satisfied upon payment of a mere fraction of the contract, as the final decree here does?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) In its *Faitoute Iron & Steel Co. v. City of Asbury Park* decision of June 1, 1942, this Court ruled that "The bankruptcy power is exercised * * * only in a case where the action of the taxing agency in carrying out a plan of composition approved by the bankruptcy court is authorized by state law", thus re-affirming the doctrine of immunity, but leaving undetermined the question of whether Chapter IX, being subject to state laws which could "interfere with or complement the bankruptcy act or to provide additional or auxiliary regulations" (*Int. Shoe Co. v. Pinkus,* supra) is still a "uniform law on the subject of bankruptcy throughout the United States", and also leaving unresolved whether an ex post facto State consent act, as in the case of Cal. Stat. 1939, Chap. 72, can be effective without impinging subdivision 1, Sec. 10, Article I of the Constitution. Nothing said in the *U. S. v. Bekins* case re-

pudiated the following from the *Ashton* case (298 U. S. 513): "Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted".

Further, this Honorable Court in the case of *Utah v. Harkness,* decided April 27, 1942, explicitly enumerated the three respects in which the state taxing power is limited, but did not suggest that the bankruptcy clause is among them. These questions of law badly need resolving by the one Court that speaks for the entire Nation.

(2) This Court, we submit, should indicate whether the judgment dismissing the petition filed by respondent under the original Chap. IX of the Bankruptcy Act (58 S. Ct. 30), and which sought approval of the precise "plan" as in the instant case, and petitioner was a party opposing the first petition, is *res judicata* as between the same parties here, under the rule declared in *Chicot County Dr. Dist. v. Baxter State Bank,* 308 U. S. 371.

(3) The decision below is in direct conflict with that of the Circuit Court of Appeals of the Eighth Circuit in *Spellings v. Dewey,* 122 F.(2d) 652.

The following decisions are in direct conflict with the decision of this Court on June 1, 1942 in the case of *Faitoute v. Asbury Park,* where it is said, that the amended Chapter IX "was carefully circumscribed to reserve full freedom to the states":

In re Summer Lake I. D., 33 F. Supp. 504;
In re S. Beardstown Dr. Dist., 125 F.(2d) 13.

Wherefore, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of said Court in the case numbered and entitled in its dockets as "No. 9955, J. R. Mason, Appellant, vs. Merced Irrigation District, Appellee", and that the decree of said Court be reversed by this Court with directions to dismiss the bill, and for such other relief as to this Court may seem proper.

Dated, San Francisco, California,
June 12, 1942.

J. R. MASON,
Petitioner.

GEORGE THOMAS DAVIS,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

FACTUAL BACKGROUND OF THE CASE.

A statement of the facts surrounding the case is made in the preceding petition.

SPECIFICATION OF ASSIGNED ERRORS.

Statement of the points relied upon were filed in the Circuit Court of Appeals as required by the rules of that Court. These are set out at pages 58, 72 et seq. of the record and they constitute the errors that were relied upon on the appeal.

I.

THE DECREE APPEALED FROM INTERFERES WITH THE TAXING AND BORROWING POWERS OF THE STATE.

In the *U. S. v. Bekins* case (304 U. S. 27) no question as to the validity of any decree or plan of composition was before the Court. No jurisdiction over respondent was involved in the interlocutory decree, which this Court declined to review. Therefore, this is the first opportunity to raise the question here presented, as an actual controversy.

Even the dissenting opinion in the *Ashton* case (298 U. S. 513) noted vigorously the restrictions against decrees that would "interfere with any of the political or governmental powers of the taxing district", and observed "* * * On the other hand, the restrictions are important as indicating the care with which the governmental powers of the State and its subdivisions are maintained inviolate".

The radically strengthened severability clause in the amended Chapter IX, we respectfully submit, is proof that the Congress recognized that decrees could be issued under the Act that this Court would not approve. We also respectfully submit that if any order or decree could be issued that would trespass the explicit limitations, in subsection (c) of Section 403, the final decree here must be reversed.

Not to reverse the final decree would be to terminate the independence of the State's taxing power reaffirmed as recently as April 27, 1942 in the case of *State Tax Commission of Utah v. Harkness,* No. 814, October 1941 Term, in which this Court stated:

"The taxing power is an incident of government. It does not derive from technical legal concepts. The power to tax is co-extensive with the fundamental power of society over the person and things made subject to tax. Each State of the Union has the same taxing power as an independent government, except insofar as that power has been curtailed by the federal Constitution. * * * And the exercise by the States of their constitutional power to tax may undoubtedly produce difficult political and fiscal problems. But they are inherent in the nature of our federalism and are part of its price. * * * But whether a tax is wise or expedient is the business of the political branches of government, not ours."

As was said in *Home Bldg. & Loan v. Blaisdell:*

"The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal government and its limitations of the power of the States were determined in the light of the emergency and they were not altered by emergency.

What power was thus granted and what limitations were thus imposed are questions which have always been and always will, be the subject of close examination under our constitutional system.

While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.'

> The Constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions."
>
> *Home Bldg. & Loan v. Blaisdell,* 290 U. S. 398.

And again:

> "If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the hands of a hostile judiciary."
>
> *Cheathem v. Norvekl,* 92 U. S. 561.

Does not the same rule apply to the taxation, regulation and tenure of land under the sovereign jurisdiction of a State, as this Court in *I. C. R. R. v. Illinois,* 146 U. S. 387, held applicable to water, at pages 452, 453, as follows; when it held that the Court could not

> "Sanction the abdication of the general control over lands under the navigable waters * * * Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public * * *"

The fundamental right and duty of the States to retain and affirmatively fulfill their contracts from revenue based on the value of land, immune from any interference, regulation or control by the federal Courts is of far greater importance than any question involved in the case at bar as regards profit or

loss to your petitioner. The preservation by the States of their independent power and duty to tax the value of land undoubtedly produces difficult fiscal problems, particularly for those persons who contracted to buy land at high prices and then found it impossible to fully meet both mortgages and also taxes. Such problems are not new and are inherent in the nature of our federalism and have always been a part of its price. Landlords have been notoriously unable or unwilling to provide the capital required for the financing of important irrigation, drainage and similar land improvement public works. The means by which the people as a whole could secure an equal opportunity to possess a piece of land not subject to the hazards of drought, flood or dust storms, and at a reasonable purchase cost, has been through the legislature pledging the State's taxing power for the repayment of those who invested in the bonds issued under State supervision and control to finance the cost of acquiring the water rights, and building the necessary dams, canal systems, etc. The California Irrigation District Act has weathered many panics, and time has proven that it provides full and complete machinery for administering any tax escheated land by public trustees, whose mandatory duty it is to see that the land is always managed in the public interest. Instances abound of the exploitation of land and tenants by absentees, and of their schemes to try and circumvent this California law, knowing that, if successful, less of the rent they collect will have to be paid out as taxes. But, the land is the funda-

mental asset of every State. It needs a jealous guardian and it would be idle for any person to contend that the rental value of land is a private property right that is sacred and not at all times subject to the sovereign taxing power of a State.

We respectfully submit that due regard for the doctrine of reciprocal immunity demands that no deviation be sanctioned and that the State's borrowing power and its continuing obligation to levy unlimited ad valorem taxes, confided to and contracted irrepealably by respondent, should be again ruled immune from interference, regulation or control under any amendment to the Bankruptcy Act, including 11 USCA Sections 401-404.

II.

THE VESTED RIGHTS OF THE HOLDER OF A CONTRACT WITH A SOVEREIGN STATE CANNOT BE TAKEN.

Under the settled rule of decision in this Court the execution of the bonds by the State instrumentality, respondent, constituted the execution or consummation of a contract, the rights arising from which are protected from impairment by Article I, Section 10 of the Constitution; and the obligation of the State arising out of such a contract is as much protected by Article I, Section 10, as that of an agreement by an individual. *Fletcher v. Peck,* 6 Cranch 87, 136, 137, 139, 3 L. Ed. 162, 177-179.

Where a State Court has ruled on the rights and duties of a trustee (in the Provident case, 12 Cal. (2d)

365 respondent is decreed a trustee), the Bankruptcy Court is bound by the decision. Such was the rule applied in *Ohio Oil Co. v. Thompson,* 120 F. (2d) 831 (Cert. denied).

One of the latest rulings with regard to the powers and rights of a California district functioning under the same law as respondent, when opposed by a person claiming rights to or in land, and which sustains prior rulings that land escheated is acquired by the district free of all encumbrances, and is non-taxable by a county, and is also not subject to prescription, is found in:

Anderson-Cottonwood I. D. v. Zinzer, 51 A. C. A. 791, April 29, 1942.

The Courts have held, with practical unanimity, that any substantial alteration by any subsequent legislation of the rights of a purchaser of municipal bonds, accruing to him under the laws in force at the time the bonds were issued, is void as impairing the obligation of contract.

Von Hoffman v. Quincy, 4 Wall. 535;
Woodruff v. Trapnall, 10 How. 190, 207;
Spencer v. Merchant, 125 U. S. 345, 352, 353;
Coyle v. Smith, 221 U. S. 559, 572;
Worthen v. Kavanaugh, 295 U. S. 56;
Roberts v. Richland Irr. Dist., 289 U. S. 71;
Islais Co. v. Matheson, 45 Pac. (2d) 326 (Cal.);
Selby v. Oakdale Irr. Dist., 35 Pac. (2d) 125, 140 C. A. D. 171 (Cal.);

County of San Diego v. Hammond, 6 Cal. (2d) 709;
Diekroeger v. Jones, 151 S. W. (2d) 691 (Mo.);
Waterville v. Eastport, 8 Atl. (2d) 898 (Me.);
Enterprise Irr. Dist. v. State, 69 Pac. (2d) 953 (Ore.).

That the ruling by this Court in the *Bradley v. Fallbrook Irrigation District* case (164 U. S. 112), has never been acceptable to private absentee interests holding land subject to tax by the districts functioning under the same law as respondent, is clear from the great number of subsequent attacks, direct or indirect. In this historic case, which is decisive the rule declared by this Court is that the Irrigation District Act "does not deprive the landowners of any property without due process of law". This Court reversed the Court below which had ruled in the same case, under the title, *Fallbrook Irrig. Dist. v. Bradley,* 68 Fed. 948, as follows:

> "The fact that vast sums of money have been invested in works constructed under and in pursuance of this legislation, and that bonds running into the millions have been issued and sold thereunder and that many individuals may not otherwise be able to secure water for the irrigation of their respective tracts of land, and that the validity of the legislation has been several times sustained by the Supreme Court of the State, while demanding on this court great care and caution in the constitutionality of the case, and casting upon it a very grave responsibility, can not justify it in failing to declare invalid legislation which,

> in its judgment, violates those principles of the Constitution of the United States which protect the private property of every person against the forcible taking without due process of law and for any other lawful purpose. Such questions are not to be determined by questions of expediency or hardship. Unfortunate as it will be if losses result to investors and desirable as it undoubtedly is, in this section of the country, that irrigation facilities be improved and extended, it is far more important that the provisions of that great charter, which is the sheet anchor of safety, be in all things observed and enforced."

In the instant case the Court below appears to reason that when the rental value or usufruct of land is payable annually to the State by the holder of title, and the State, as here, has irrevocably pledged that rent, or as much of it as may be needed to enable respondent to continue to function and fulfill contracts, without limit as to the number of years, the State can give a valid *ex post facto* consent to repudiate its contract, executed by its agency to whom such power and duty has been confided, if the consent is given to the Congress.

In several California irrigation districts, all of the land once held by private interests has reverted to the districts, free and clear of all mortgages and other private liens, and the State Court decisions which we submit are controlling, have paved the way for new garden communities, self help co-operatives, etc., which afford full and equal opportunity for every

working farmer to buy or rent the land from the district, as provided in Sections 29 (Cal. Stat. 1909, p. 1075) and 47 (Cal. Stat. 1921, p. 1109) of the Act.

Thus, the concern indicated in the Ashton minority opinion about all parties getting "caught in a vise", and in the *Faitoute v. Asbury Park* case over a danger of killing "the goose which lays its golden eggs", is completely inapplicable in the case at bar.

No one complains that a reversal of the decree will deprive him of any property or right he is lawfully entitled to.

If the land in any district proves to be unwanted and without a rental value, those who invested in its bonds can not hope to recover. But, no scale down of bonds will increase the rental value of any land in the district, and whether this usufruct prove to be much or little, it has been dedicated as an integral part of the "public trust", which the final decree takes from petitioner, who has a vested interest and right in it, under the Provident decision, in 12 Cal. (2d) 365.

III.

THE "INTERFERENCE" COMPLAINED OF IS TANTAMOUNT TO FEDERAL CONTROL OF THE EXERCISE OF THE POWER OF DIRECT AD VALOREM TAXATION BY THE BANKRUPTCY CLAUSE. IF THE BANKRUPTCY COURT CAN CURB TAXES OF WHICH A PORTION MUST BE APPLIED TO FULFILL CONTRACTS, WHAT POWER WOULD THE COURTS HAVE TO PREVENT CONGRESS CONTROLLING TAXES REQUIRED TO MEET OTHER STATE GOVERNMENTAL NEEDS?

In collecting its necessary revenues, over and above revenues derived from water tolls, power revenues or land rent, respondent is authorized to levy only one tax each year, which must be fixed at a rate, ad valorem sufficient to pay all costs of operation and maintenance, and also to pay contracts due and to become due the following year. Such is the square holding in *Selby v. Oakdale Irr. Dist.,* 140 Cal. App. 171, 35 P. (2d) 125. Respondent has long flouted this duty.

Had respondent no due contracts, but the operating costs alone necessitated a tax rate ad valorem higher than the holders of land believed they could afford to pay, it would obviously not lie within the jurisdiction of any federal Court to "interfere" with the levy or enforcement of the tax. The fact that some part of such taxes when, as and if collected, may have to be applied in meeting contracts, surely can not create jurisdiction which the Court could not otherwise have!

It has been sometimes suggested that decrees under Chapter IX "do not interfere with the power of the district to levy taxes". Also that the decrees do not

abridge, usurp or restrict the powers confided by the State to respondent.

But the precise word adopted by the Congress was not "restrict" but "interfere", and their meaning cannot be the same.

The final decree clearly does not "restrict" the power of respondent and petitioner has never suggested that it does.

The continuing power of direct taxation, confided irrevocably by the State to respondent, is undeniably a political and governmental power and the highest attribute of sovereignty. Once this power has been pledged to secure money borrowed by the State or its agent the rights and duties of the parties are fixed by the contract in the bond, including of course, the statutes pursuant to which the bonds were issued.

To sanction the "discharge" and absolve respondent of its trust duties as accomplished by the final decree is tantamount to the Federal Court authorizing the circumvention of substantive State law and ordering the levy and collection of taxes in an amount through the years to come at rates *ad valorem* contrary to the express and mandatory provisions of the California statute, as it stood when the bonds owned by your petitioner were voted and sold.

The word "interfere" is defined in Webster's International Dictionary as follows:

> "To enter into, to take a part in, the concerns of others; to intermeddle; interpose; intervene."

Thus, the final decree, we respectfully suggest does, by its terms "enter into and take a part in the concerns of others", as the word "interfere" is defined in Webster's International Dictionary.

Absent the discharge ordered in the final decree, respondent would, we believe, still be obligated to operate in strict compliance with the mandatory State laws applicable and to continue to levy and collect each year ad valorem taxes at rates as required by State law, until lawful contracts are all fulfilled.

Nothing in the interlocutory decree serves to "discharge" respondent, nor did the Court in that decree invoke any jurisdiction over respondent.

The basic theory of reorganization or composition is to keep the enterprise functioning as an organism and to prevent its dissipation or dismemberment by the enforcement of liens. Finletter, The Law of Bankruptcy Reorganization, page 150 (1939).

Since the *Bekins* case, supra, it has been conclusively established by the California Supreme Court that under no circumstances could petitioner obtain an order against respondent enforceable by execution, garnishment or attachment.

El Camino L. C. v. El Camino Irr. Dist. (1938), 12 Cal. (2d) 378, 85 P. (2d) 123;

Moody v. Provident Irr. Dist. (1938), 12 Cal. (2d) 389, 85 P. (2d) 128.

These determinations are based on the conclusion that the State is the real party in interest, that all

revenues and property of the district constitute a "Public Trust", owned by the State.

In a case where similar jurisdiction questions were presented and where the State had also waived its immunity and consented to be sued the Court below held squarely that jurisdiction must fail, in *Cargile v. New York Trust Co.*, 67 F. (2d) 585.

To allow the final decree to stand would be to give the holders of mortgages and land, as owners, a windfall. In the recent 5 to 4 decision by this Court in the *People of Puerto Rico v. Russell & Co.* No. 95, decided March 16, 1942, the minority opinion declares:

> "Only under the compulsion of plain and unambiguous language should we permit a beneficiary of such a project to escape his fair share of the costs. There is no such compulsion here. Hence we should refuse to let the contract clause of Puerto Rico's organic law produce an inequitable, unfair and harsh result."

Your petitioner submits that a reversal of the decree must serve therefor, to promote equal civil rights, and constitute an important step towards the solution of the economic and sociological problem foreseen by Thomas Jefferson, in his letter written in 1795 to the Reverend James Madison, as follows:

> "The earth is given a common stock for man to labor and live on. If, for the encouragement of industry we allow it to be appropriated, we must take care that other employment be provided to those excluded from the appropriation. If we do not, the fundamental right to labor the earth returns to the unemployed. It is too soon yet in

> our country to say that every man who cannot find employment, but who can find uncultivated land shall be at liberty to cultivate it, paying a wholesale rent. But, it is not too soon to provide by every possible means that as few as possible shall be without a little portion of land. The small holders are the most precious part of a State."

Among the recommendations made by the "Commission on Re-employment", in its report of September 30, 1938 to the Governor of California, who had appointed them, the following appears in Chapter VII.

> "Settlement and resettlement programs are largely dependent upon the availability of low cost lands, as well as the economical utilization of tax delinquent property which has been deeded or sold to the State. * * * The situation with regard to tax delinquent property is particularly in need of study and clarification. * * * A conspicuous feature of agriculture in California is large scale ownership and operation of farm land. The most casual survey reveals that thousands of families with farm experience are unable to buy or rent land. * * * All the problems centering in the ownership and use of land are so vital to the larger aspects of the employment and living conditions of our citizens that a thorough overhauling of our land policies, including records, taxes, delinquency laws, penalties and ownership should be made."

Another State agency, the Planning Board in its 1938 report entitled "Tax Delinquent Land in Cali-

fornia" vigorously recommended that tillable escheated land "be made available for resettling homeless 'dust bowl' and other families now in California".

The paradox of the case at bar is that a reversal of the decree will operate to reduce the price of all land within the taxable boundaries of respondent, and make it more cheaply accessible to every person seeking a location for a home, farm or industry, whether in the urban or rural areas. A reversal of the decree must therefore operate to advance equality of opportunity and to promote national defense. This because there are no means by which a tax on the rental value of land can be shifted to a tenant or anyone else, nor can it affect the cost of production. It merely takes so much from the land holder, as owner and transfers it to the State.

That such a tax is direct and can not be shifted was unanimously held in the *Pollock* cases (157 U. S. 429, 158 U. S. 601), and is a fact recognized by all economists of reputation.

"Principles of Political Economy", Bk. 5, Ch. III, Sec. 2, John Stuart Mill;

"Wealth of Nations", Bk. V, Ch. 2, part 2, art. 7, by Adam Smith;

"Principles of Economics", 3rd Rev. Ed. p. 540, Taussig;

"Elementary Economics", 3rd. Ed., p. 74, Fairchilds, Furniss and Buck.

IV.

SOCIAL PROBLEMS CANNOT AND SHOULD NOT WARRANT ANY "INTERFERENCE" WITH CONSTITUTIONAL STATE POLICIES OF TAXATION, TENURE AND CONTROL OF LAND UNDER ITS SOVEREIGN JURISDICTION.

It being long ago settled that bondholders' inability or failure to recover through the legal remedies afforded will not justify a court of equity in any attempt to devise some method to accomplish that end (*Rees v. City of Watertown,* 19 Wall. 107; *Heine v. Levee Commissioners,* id. 658), *a fortiori,* if recovery through the legal remedies provided is possible, which we insist that it is, the legislature alone, and not a court of equity has the complete and exclusive power to devise some method to relieve taxpayers, and taxpayers problems are equally not a matter for the Courts to undertake to solve.

Ohio Life Ins. Co. v. Debolt, 16 How. 415;
Arkansas Corp. v. Thompson, 312 U. S. 673;
County of San Diego v. Hammond, 6 Cal. (2d) 709;
Thompson v. Allen County, 155 U. S. 550.

In *In re Jessup,* 81 Cal. 408, at page 423, it is decreed:

> "Liberal construction does not require or authorize the frittering away of the written law. Nor are we authorized to consider the apparent justice or hardship of particular cases, for we are not appointed to decide cases alone, but to settle principles first, and second to decide cases according to those settled principles as applied to the facts presented in the cases. The decision of a single case according to its apparent justice or hardship

> might establish a principle that would cause greater injustice or greater hardship in numerous other cases."

In *Allen v. Regents,* 304 U. S. 439, 456, Mr. J. Reed, in his concurring opinion, wrote:

> "Respondents being merely collectors of tax moneys, are not entitled either to enjoin collection of these moneys or to pay and recover them. * * * Respondents would lose nothing by collecting the tax and turning it over to the United States."

It is respectfully submitted that neither should respondent in the case at bar be entitled to any more discretion than were the Regents of the University of Georgia. Respondent is also "merely collectors of tax moneys" and "would lose nothing by collecting the tax and turning it over" to those it has obligated itself to repay.

The bonds at bar are similar to the bonds involved in the *Pillsbury* case (105 U. S. 278) in which the Court said at page 288:

> "The annual tax was the security offered creditors; and it could not be afterward severed from the contract without violating its stipulations any more than a mortgage executed as security for a note given for a loan could be subsequently repudiated as forming no part of the transaction."

The Supreme Court of Florida in the *Clearwater* case (147 So. 460), after citing the *Pillsbury* case, supra, said:

> "In other words, such bonds are but the present funding of the necessary future taxes contracted

> to be levied in order to pay them off in due course as to the stipulated principal and interest."

In the case of *Murray v. Charleston,* 96 U. S. 432, the rule was stated:

> "But until the payment of the debt or interest has been made, as stipulated, we think no act of State sovereignty can work an exoneration from what has been promised to the creditor; namely payment to him, without a violation of the Constitution. 'The true rule in every case of property founded on contract with the government is this: It must first be reduced into possession, and then it will become subject, in common with other similar property, to the right of the government to raise contributions upon it."

In the recent case of *Day v. Ostergard,* 21 Atl. (2d) 319, the Supreme Court of Pennsylvania when asked to decide whether an Act of the Legislature giving mortgages a lien prior to subsequent levied taxes was constitutional, stated:

> "Every owner of realty holds it subject to the paramount sovereign power of the commonwealth to subject it to the burden of taxes, and if need be to enforce collection thereof by the sale of the land and an owner is powerless to divest his land of the tax burden, except by payment of taxes."

In the case at bar it is clear that the final decree has the effect, both from a legal and practical standpoint, of regulating the means by which and extent to which real property shall be privately owned and taxed by a State.

We respectfully submit that no jurisdiction has been ever granted by the Congress to its Courts to add to or subtract from, change or modify the taxing and remedial procedure established and provided by State law so as to grant any new or additional or lesser remedies and that the final decree here constitutes an order curbing the irrevocable pledge of the States' taxing power, confided to respondent, and it is an "interference" with the lawful exercise of the political and governmental powers of the respondent.

> "Rather than making the land within the district security for the bond issue in proportion to the benefits conferred, the California legislature saw fit to delegate to the district its power to levy yearly assessments upon the land. * * * This was a delegation of a part of its taxing power, and the validity of the exercise of that power by the district must be measured by the same yardstick as though it were being exercised by the State."
>
> *U. S. v. Anderson-Cottonwood Irr. Dist.*, 19 F. Supp. 740.

In the historic *Fallbrook* case, this Court ruled that the choice of methods employed by a State to lay taxes on land,

> "is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to benefits it has received, which is open to the discretion of the State legislature, and with which this Court ought to have nothing to do" (164 U. S. 112).

This final decree furthermore, in operating to curb the future tax levies by exactly the amount taken from your petitioner by the final decree, seems to also clearly impugn the rule declared by this Court in *Ex parte Williams,* 227 U. S. 267, as follows:

> "Assessments become reviewable judicially only when they are translated into action, as by the levy of a tax based on the assessment."
>
> * * * * * * *
>
> "Taxation cannot create debt until there is a tax fixed in amount and perfected in all respects. It is not enough to lay the foundation, but the structure must be built."
>
> *Buckout v. City of New York,* 68 N. E. 659, 661.
>
> "It is universally held that real or immovable property is exclusively subject to the law of the country or state in which it is situated, and no interference with it by the law of any other sovereignty is permitted. 11 American Jur., Conflict of Laws, § 30."
>
> *Skaggs v. Comm.,* 122 F(2d) 721. (Cert. denied, No. 866, Mar. 2, 1942.)
>
> "Owners of agricultural land are not entitled to injunction against collection of real estate taxes levied against their land on ground of overvaluation of agricultural property."
>
> *Tuttle v. Bell,* 377 Ill. 510, 37 N. E. (2d) 180. (Cert. denied, No. 916, Mar. 2, 1942.)
>
> "In Laguna Beach County Water District v. Orange County, 1939, 30 Cal. App. (2d) 740,

at page 743, 87 Pac. (2d) 46, at page 48, in which case a hearing was denied by the Supreme Court, the court applied the same rule to a county water district saying, 'It is thoroughly settled that among such organizations, Irrigation Districts, Drainage Districts, Utility Districts and other similar organizations, are not municipal corporations, but public agencies, exercising governmental functions and that, under the theory that their properties are in effect properties of the State, they are not subject to taxation'. Sec. 85, 24 Cal. Jur. 102, and cases cited."

Metropolitan Water Dist. v. Riverside County, 124 Pac. (2d) 363.

The decision below is in direct conflict with that of the Circuit Court of Appeals of the Eighth Circuit in *Spellings v. Dewey,* 122 F.(2d) 652.

The following decisions are in direct conflict with the decision of this Court on June 1, 1942 in the case of *Faitoute v. Asbury Park,* where it is said, that the amended Chapter IX "was carefully circumscribed to reserve full freedom to the states":

In re Summer Lake I. D., 33 F. Supp. 504;

In re S. Beardstown Dr. Dist., 125 F.(2d) 13.

In The Federalist, No. XXXIII by Hamilton, appears the following:

"The inference from the whole is, that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports * * *

> Suppose, again, that upon the pretence of an interference with its revenues, it should undertake to abrogate a land-tax imposed by authority of the State; would it not be equally evidence that this was an invasion of that concurrent jurisdiction in respect of this species of tax, which its Constitution plainly supposes to exist in the State governments? If there ever should be a doubt on this head, the credit of it will be entirely due to those reasoners who, in the imprudent zeal of their animosity to the plan of the convention, have labored to envelope it in a cloud calculated to obscure the plainest and simplest truths."

The location of the sovereignty controlling the tenure of land is one of the supreme political questions around which the debates in The Federalist revolved, and it was recognized even by the leading centralist Hamilton that if the power was ever shifted from the States to the Congress, the principle of dual sovereignty would be abandoned and the whole spirit of the Constitution endangered.

The Federalist Nos. XII, XXX to XXXVI seem squarely in point.

CONCLUSION.

It is significant that there is nothing in the Constitution of the United States permitting a State to take any action, whether opposing or consenting to the power of the Federal Government springing from the bankruptcy clause, either with or "without the

consent of the Congress". On the contrary, subdivision 4 of Section 8 of Article I of the Constitution confers on Congress the power "to establish * * * uniform laws on the subject of bankruptcies throughout the United States,"; but there is no uniformity if Chapter IX of the Bankruptcy Act is operative in those States which consent to its operation, and is not operative in those States which oppose its operation.

Subdivision 1 of Section 10 of Article I forbids any State from passing a law impairing the obligation or contracts, and by contrast with the other subdivisions of Section 10 does not limit that inhibition merely to action by the State "without the consent of the Congress" as the other subdivisions are limited.

In other words, Congress cannot consent to any action by the States that will impair the obligation of contracts and the States cannot consent that Congress can enact anything except "uniform laws on the subject of bankruptcies throughout the United States".

May we respectfully suggest that, after all, the lack of power, as reaffirmed in the Ashton decision was not repudiated nor reversed in the *Bekins* or *Faitoute* cases, and the force and effect of the final decree, as applied in this case, depends wholly upon the power vested in the Congress by the Constitution. Whatever power there is, is unlimited. If Congress has not the power to sanction what is accomplished by the final decree without the consent of the State, then it has no power at all in this precise field.

In the midst of war, we must be even more vigilant to preserve the substance of our dual sovereignty, or the Declaration of Independence and Constitution themselves must become no more than scraps of paper and once the States which entered into a compact to form a federal union look with apathy on any interference with their borrowing power which paves the way for descent into the gulf which has swallowed all in other lands, we have as Thomas Jefferson so well said "only to weep over the human character found uncontrollable but by a rod of iron and the blasphemers of man as incapable of self government become his true historians". (C. VII, 216.)

It is submitted that a writ of certiorari should be granted, the decree of the Court below reversed and the proceeding directed to be dismissed.

Dated, San Francisco, California,
June 12, 1942.

Respectfully submitted,
GEORGE THOMAS DAVIS,
Counsel for Petitioner.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 159

J. R. MASON,
Petitioner,

vs.

MERCED IRRIGATION DISTRICT,
Respondent.

BRIEF FOR RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

STEPHEN W. DOWNEY,
Capital National Bank Building, Sacramento, California,
Attorney for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Table of Authorities Cited

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BRIEF FOR RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

The petition for certiorari herein shows that the interlocutory decree confirming the plan of composition proposed by respondent has been entered and become final and that respondent has duly and faithfully carried out all of the requirements of the interlocutory decree. It is not even suggested by argument or otherwise that respondent has failed in the slightest respect to fulfill the conditions of the plan of composition or

the interlocutory decree. Therefore, pursuant to the governing statute (Sec. 83f of the Bankruptcy Act, 11 USCA, Sec. 403)[1] respondent is entitled to a final decree discharging it from all debts and liabilities dealt with in the plan confirmed. Obviously the only thing determined by the final decree is that the District has carried the interlocutory decree into effect and that fact is admitted by the petition here.

In the companion case of *J. R. Mason v. Anderson-Cottonwood Irrigation District,* No. 1198, certiorari was denied by this Court June 1, 1942. That case was argued in the Circuit Court of Appeals contemporaneously with the *Merced* case and both cases were decided by the Circuit Court on the same day.[2] The petition for certiorari in the *Anderson-Cottonwood* case presented substantially the same questions presented here.

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[1] "Final Decree—If an interlocutory decree confirming the plan is entered as provided in subdivision (e) of this section, the plan and said decree of confirmation shall become and be binding upon all creditors affected by the plan, if within the time prescribed in the interlocutory decree, or such additional time as the judge may allow, the money, securities, or other consideration to be delivered to the creditors under the terms of the plan shall have been deposited with the court or such disbursing agent as the court may appoint or shall otherwise be made available for the creditors. And thereupon the court shall enter a final decree determining that the petitioner has made available for the creditors affected by the plan the consideration provided for therein and is discharged from all debts and liabilities dealt with in the plan except as provided therein, and that the plan is binding upon all creditors affected by it, whether secured or unsecured, and whether or not their claims have been filed or evidenced, and, if filed or evidenced, whether or not allowed, including creditors who have not, as well as those who have, accepted it."

[2] *Mason v. Anderson-Cottonwood Irrigation Dist.,* 126 F. (2d) 921;
Mason v. Merced Irrigation Dist, 126 F. (2d) 920.

Since the only purpose of the final decree is obviously to adjudicate that the plan of composition has been carried into effect as provided in the interlocutory decree, petitioner is really seeking to overthrow a judgment which has become final. Moreover, all matters raised by petitioner were fully argued and considered and resolved against him in the long protracted proceedings which terminated in the interlocutory decree. Further, no interference with governmental power is shown and none exists.

The petition for certiorari wholly fails to show any reason for issuance of the writ. There is no real showing of any conflicts among the circuits on the point presented, no showing of any grave question of vital importance to the public or any other showing which would even colorably justify the writ.

The petition should be denied.

Dated, Sacramento, California,
September 30, 1942.

Respectfully submitted,
STEPHEN W. DOWNEY,
Attorney for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 159

J. R. MASON,
Petitioner,

vs.

MERCED IRRIGATION DISTRICT,
Respondent.

PETITION FOR A REHEARING.

GEORGE THOMAS DAVIS,
Mills Tower, San Francisco, California,
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

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J. R. MASON,
Petitioner,

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MERCED IRRIGATION DISTRICT,
Respondent.

PETITION FOR A REHEARING.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner herein, J. R. Mason, and presents this his petition for a rehearing of the petition for a writ of certiorari herein, and in support thereof respectfully submits:

The final decree as construed and applied violates the settled principle that a federal court has no jurisdiction to interfere with the borrowing power of the States or with the performance by public officials of public duties.

It is submitted that nothing contained in the *U. S. v. Bekins* decision (304 U. S. 27) reversed or in any way modified the doctrine of immunity adhered to in the

Ashton case (298 U. S. 513) or the *Brush* case (300 U. S. 352, 367, 369). This doctrine has, we submit, been also adhered to steadfastly in subsequent cases, such as *Arkansas Corp. v. Thompson* (313 U. S. 132), *Central R. R. of N. J. v. Martin,* 115 F. (2d) 968. (Cert. denied.)

In the case of *U. S. v. Bekins,* supra, no question as to the validity or effect of any order was before the Court.

The Court is not permitted to invoke any jurisdiction over a petitioner in any interlocutory decree rendered under Chapter IX. (11 U. S. C. A. 401-404.) None was invoked in that decree in the instant case, upon respondent.

The statute in Sec. 403f provides separately for a final decree, from which this appeal is taken.

Respondent argues, "Obviously the only thing determined by the final decree is that the district has carried the interlocutory decree into effect. . . . Further, no interference with governmental power is shown and none exists." Respondent is mistaken.

We quote from the final decree, as follows:

> "Petitioner, Merced Irrigation District is hereby discharged from all debts and liabilities dealt with in the plan of composition . . ."

This "discharge" in the final decree constitutes an "interference" with governmental power and with the irrevocable pledge to exercise the taxing power confided to respondent, because it allows public officials to violate the taxing and remedial procedure contracted under state law.

The power of a state to borrow money and contract its inexhaustible power to annually levy and collect ad valorem taxes, whether that power is contracted by the State or an instrumentality of the State to whom that

power has been confided as here, is one of the highest attributes of sovereignty and governmental power.

The following cases prove conclusively that the final decree as construed and applied, supra, constitutes an "interference" with the exercise of governmental powers:

Selby v. Oakdale, 140 Cal. App. 171, 35 Pac. (2d) 125; *Provident v. Zumwalt,* 12 Cal. (2d) 365, 85 Pac. (2d) 116; *Anderson-Cottonwood v. Klukkert,* 13 Cal. (2d) 191, 88 Pac. (2d) 685; *Happy Valley v. Thornton,* 1 Cal. (2d) 325, 34 Pac. (2d) 991; *Herring v. Modesto,* 95 Fed. 705; *Bradley v. Fallbrook,* 164 U. S. 112.

The same basic jurisdictional question presented in the instant case was submitted to this Honorable Court by appellant's counsel in the case of *Ashton v. Cameron County Water Imp. Dist. No. 1,* No. 859, October Term, 1935, "Motion for leave to file brief as amici curiae in opposition to motion for rehearing and brief in support thereof", signed by Messrs. W. C. Cook and Samuel Herrick, counsel.

The final decree, as construed and applied in the instant case squarely conflicts with the rule in the *Ashton* case, which is still, we think, the law of the land:

> "Neither consent nor submission by the States can enlarge the powers of Congress. . . . Our special concern is with the existence of the power claimed—not merely the immediate outcome of what has already been attempted . . . The difficulties arising out of our dual form of government, and the oportunities for differing opinions concerning the relative rights of the state and national governments are many; but for a very long time this Court has adhered steadfastly to the doctrine that the taxing power of Congress does not extend to the States and their political subdivisions. The same basic reasoning which leads to

that conclusion, we think, requires like limitation upon the power which springs from the bankruptcy clause."
Ashton v. Cameron County, 298 U. S. 513.

"The substance, and not the shadow, determines the validity of the exercise of the power."
Postal Tel. Co. v. Adams, 155 U. S. 688.

It is therefore respectfully urged that this petition for a rehearing should be granted, and that a writ of certiorari be issued out of and under the seal of this Honorable Court as prayed for in the petition for writ of certiorari herein.

Dated, San Francisco, California,
October 28, 1942.

Respectfully submitted,
GEORGE THOMAS DAVIS,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I, George Thomas Davis, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Dated, San Francisco, California,
October 28, 1942.

GEORGE THOMAS DAVIS,
Counsel for Petitioner.